In the Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
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No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1521

CHANNEL TWO TELEVISION COMPANY, ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1595

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *Respondents*

No. 76-1604

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *Petitioner*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

No. 76-1624

ILLINOIS BROADCASTING CO., ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *Respondents*

No. 76-1685

THE POST COMPANY, ET AL., *Petitioners*

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, ET AL., *Respondents*

OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent National Citizens Committee for Broadcasting (NCCB) respectfully urges this Court not to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals appears at FCC App. 1-60.[1] It reversed and remanded the FCC's Second Report and Order in *Multiple Ownership,* 50 F.C.C. 2d 1046, *reconsideration denied,* 53 F.C.C.2d 589 (1975), which appears at FCC App. 61-158. The Court of Appeals issued an explanatory order of its decision when it partially stayed the mandate on April 5. This appears at FCC App. 159-67.

JURISDICTION

This Court's jurisdiction has been invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission, having adopted a primary policy of maximizing diversity in the ownership of broadcast stations, was properly reversed by the Court of Appeals on grounds that it had arbitrarily differentiated among its licensees in setting the standard for divestiture of cross-owned media, and that the Commission used unsupported rationalizations to prefer the private economic interests of certain favored licensees over the long-standing public interest mandate for diversification.

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[1] References to the FCC's Petition or Appendix will be cited as "FCC Pet." or "FCC App." Other abbreviations for petitioners' petitions are self-explanatory.

STATUTES INVOLVED

NCCB relies on the FCC's and Channel Two's petitions for a statement of the statutes involved, all of which appear in the Petitioners' Appendices.

COUNTER-STATEMENT OF THE CASE

1. The FCC's Increased Emphasis on Diversification of Ownership

Since the 1940's, the Federal Communications Commission, as one of its primary responsibilities under the public interest standard of the Communications Act of 1934, has been giving ever increasing importance to diversifying the ownership of sources of information. In 1941, it required NBC to divest one of its dual networks.[2] In 1941-43, it adopted "duopoly rules" barring common ownership of two local broadcast stations of the same type, and required divestiture within six months.[3] And in 1953, the Commission specified maximum numbers of TV, AM and FM stations allowed to be under common ownership nationally.[4]

Also, when choosing between competing applicants for licenses, the Commission has increased the importance of the diversification factor. In the 1950's it repeatedly found this factor determinative against a com-

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[2] Report on Chain Broadcasting, Docket 5060, May, 1941. *See* National Broadcasting Corp. v. United States, 319 U.S. 190 (1943).

[3] Duopoly Rules, 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943). *See* 1945 F.C.C. Annual Report, at 12; *cf.* Newspaper Ownership of Radio Stations, 9 Fed. Reg. 702 (1944).

[4] *See,* Amendment of the Multiple Ownership Rules, 18 Fed. Reg. 7796 (1953), *affirmed* United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

peting applicant with co-located newspaper and broadcast interests.[5] In its *Policy Statement on Comparative Broadcasting Hearings,* 1 F.C.C.2d 393 (1965), the Commission held that such hearings had as a "primary objective" the "maximum diffusion of control of the media of mass communications," since "[d]iversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities."[6]

In 1970 the Commission, again "to promote maximum diversification of programming sources and viewpoints," *Multiple Ownership,* Notice, 33 Fed. Reg. 5315 (1968), barred future creation or transfer of TV-radio (AM/FM) combinations. *Multiple Ownership,* First Report and Order, Docket 18110, 22 F.C.C.2d 306 (1970).[7]

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[5] *E.g.,* Northeastern Indiana Broadcasting Co., 9 Rad. Reg. (P-F), 261 and 318a (1953); Radio Station KFH Co., 11 Rad. Reg. (P-F) 1; see also McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956) *cert. denied,* 353 U.S. 918 (1957).

[6] Id. at 394. In listing factors that would be taken into account in considering competing applicants, the Commission ranked diversification first:

> 1. • • • Diversification is a factor of primary significance since • • • it constitutes a primary objective in the licensing scheme.

Id.

[7] Contemporaneously, the Commission adopted rules requiring divestiture of cable systems by television networks and by television licensees in the same market. CATV, Second Report and Order, 23 F.C.C.2d 816 (1970); 47 C.F.R. § 76.501 (1975). *But see* Cable Television Systems, Second Report and Order, 55 F.C.C.2d 540 (1975), *appeal pending sub nom.* National Citizens Committee for Broadcasting v. FCC, D.C. Cir. No. 75-1933 (filed Sept. 22, 1975). The Commission had also adopted in 1966 rules

2. The 1970 Proceeding

Concurrently with its First Report, the Commission issued a Further Notice of Proposed Rulemaking, *Multiple Ownership,* Docket 18110, 22 F.C.C.2d 339 (1970), proposing to require divestiture within five years of all existing newspaper-broadcast or television-radio combinations in a single market. Future creation or transfer of newspaper-broadcast combinations would also be barred, for, the Commission found, "[i]t has now become clear that *the most significant aspect of the problem is the common control of television stations and newspapers of general circulation.* For . . . the public looks primarily to these two sources for its news and information on public affairs. (Id. at ¶ 26. Emphasis added.)

After extensive rulemaking proceedings, and spurred by Congress and the courts,[8] the Commission in 1975 issued its Second Report and Order. (FCC App. 61.) The Commission prohibited the creation of future TV-newspaper combinations in the same community. Even though the record was inconclusive on the question of whether actual abuses stemmed from broadcast-newspaper cross-ownership, the Commission acted to increase the diversity of media voices. (FCC App. 165.) However, with two Commissioners dissenting (FCC App. 123 and 128), the Commission refused to order

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requiring divestiture of cable systems owned by telephone companies. *See* General Tele. Co. v. United States, 449 F.2d 846 (5th Cir. 1971). Thus, the Commission has long imposed divestiture remedies on cross-ownerships involving media other than newspapers.

[8] *See, e.g.,* H.R. 12993, 93d Cong., 2d Sess., Mar. 28, 1974, requiring the Commission to complete Docket 18110 within six months; Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 330 (D.C. Cir. 1974).

general divestiture of existing co-located combinations (FCC App. 93-100). It claimed that "local ownership," "continuity of operations," and "local economic dislocations" outweighed "a mere hoped for gain in diversity." (FCC App. 93, ¶ 109.) The Commission therefore ordered divestiture solely of "egregious" combinations—*viz.*, small-market absolute monopolies.[9] And it would act in other situations only upon a showing of economic monopolization under the Sherman Act. (FCC App. 103.)[10]

3. The Court of Appeals Decision

Upon appeals brought by NCCB, several licensees facing divestiture, the National Association of Broadcasters, and the American Newspaper Publishers Association, the Court of Appeals reversed the Commission. (FCC App. 1.) It upheld the Commission's assertion of authority to act to increase diversity prospectively even though the Commission had found no established record of actual abuses flowing from cross-ownership. But the court reversed the Commission's decision that such a record is necessary before divestiture of existing cross-ownerships could be ordered. (FCC App. 47.) The court examined the reasons put forth by the Commission for this inconsistent posi-

[9] As long as the community had one other entering "city-grade signal," (the strongest signal possible) whether or not that station was licensed to the community in question, divestiture was not required. (FCC App. 96-97, § 114.) This narrow divestiture standard covered only seven of the 79 television-newspaper cross-owners; and only nine radio-newspapers cross-owners were ordered to divest. (FCC App. 113.)

[10] Reconsideration of the Second Report was denied. Multiple Ownership, Memorandum Opinion and Order, 53 F.C.C.2d 589 (1975) (FCC App. 148).

tion, and found them, upon thorough analysis of the record, to be invalid. As it later summarized:[11]

> We were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to restore consistent administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16).

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

Petitioners argue that certiorari should be granted because of the considerable impact of the decision. We recognize this impact but nevertheless urge that certiorari should be denied. For the decision below establishes no new principle or policy but rather is clearly correct in its analysis and holding as to the Commission's policies.

The Court of Appeals affirmed the Commission in its stress on the importance of the diversification policy and its decision to impose prospective limitations against newspaper-broadcast cross-ownership

[11] Summary taken from the Court's Order (on Motion for Stay of Mandate), April 5, 1977, at 7 (FCC App. 167) (hereinafter "Stay Order").

(FCC App. 17-33). This rule is clearly within the Commission's authority, and, as NCCB establishes below, the Court of Appeals is correct on this issue. *E.g., United States v. Storer Broadcasting Corp.*, 351 U.S. 192 (1956).

On the divestiture aspect, the Commission drew the narrowest line imaginable, based on an absolute monopoly standard ("no incoming signal"), and "grandfathered" 90% of the cross-owned licensees in the country. The Court of Appeals correctly reversed this arbitrary distinction among broadcast licensees, because it is riddled with error, having neither evidence nor reasons for support.

The court's final disposition logically flowed from the above holdings. It has not, as the petitions seem to suggest, ordered the divestiture of every local cross-ownership in the country. Rather its decision affords the agency full opportunity upon remand to insure that its further actions serve the public interest both generally and in each particular situation. Thus, the court's order calls for a hard look by the Commission at each case, and permits further proceedings in which the Commission can determine, with the proper presumptions and upon rational analysis of the evidence, a fair and reasonable line to be drawn for requiring divestiture by rule.

1. The Commission's Policy Concerning the Great Importance of Diversifying Ownership of Mass Media Supports the General Holding of the Court of Appeals

In the Second Report, the Commission found that separate ownership of co-located newspapers and broadcast stations is markedly, and indeed almost uniquely, required in the public interest:

> If our democratic society is to function, *nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible* . . . . [I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.
>
> FCC App. 94-95, ¶ 111 (emphasis added).

The Commission correctly found that this consideration was especially applicable to newspaper-television cross-ownerships because of the prime importance of both the newspaper and the TV station in providing information on local issues. (FCC App. 98, ¶ 115.)[12]

The Court of Appeals was correct in sustaining this Commission policy. It pointed out, citing *Columbia*

[12] *See also* the Further Notice in 18110:

> In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, *it is not desirable that these two organs of mass communication should be under the same control in any community.* A direct parallel would be the ownership of two television stations in the same community by the same person, which the Commission without substantial disagreement from any sources, has never permitted. *The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations.*
>
> 22 F.C.C.2d 339, 346 (1970) (emphasis added).

To the same effect, then Chairman Burch stated:

> "Clearly, the media cross-ownership matter warranting the most attention is that of VHF-TV and the daily newspaper. There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter."
>
> *Id.* at 350.

Broadcasting System v. Democratic National Committee, 412 U.S. 94, 122 (1972), that the public interest standard encompasses First Amendment principles, and specifically that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States,* 326 U.S. 1, 20 (1945). (FCC App. 21.) Surely there is no need for this Court to review the holding that the Commission can both stress and promote diversification of ownership of the media of mass communication.

2. The Commission's Reasons for Failing To Require General Divestiture Are Invalid

It follows that without divestiture, a situation that the Commission has found on its face to be adverse to the public interest will persist in many communities. (FCC App. 85.)[13] Nevertheless the Commission opted not to require divestiture generally, but rather to await showings of actual abuse by grandfathered cross-owners. The Commission may have the discretion to so act, if it sets forth valid public interest reasons. But even according the agency great deference, its reasons here are patently arbitrary, as the court below pointed out. (FCC App. 52-59.)

The Commission arbitrarily denigrated the value of diversified ownership in the context of divestiture, call-

[13] While the Commission states that the situation will improve over time with transfers, for many license periods in many communities the public interest in diversity will be adversely affected. Indeed, Commissioner Robinson pointed out that "in most of the markets involving newspaper-television station ownership, the stations have been commonly owned since the time of original license" and that "very few of [these] common ownerships . . . have been dissolved [by sale]." (FCC App. 142.)

ing it an "abstract goal" (FCC App. 93, ¶ 108), "a mere hoped for gain in diversity . . ." (*id.,* ¶ 109), and " . . . some theoretical increase in already existing diversity . . . ." (FCC App. 98, ¶ 114.) There is simply no basis for the FCC to stress so heavily the importance of diversification in the prospective rule and absolute monopoly situations, and then disparage it in, for example, the one newspaper-two TV situation or two newspaper-one TV situation.[14] Clearly the importance of the *Associated Press* principle (that the First Amendment assumes diverse information sources) upon which we have "staked our all" remains constant.

The Commission cited the possibility of "hardship for individual owners." (FCC App. 93.) But as the Court of Appeals stressed (FCC App. 34, 50), the broadcaster has no vested property interest; it must apply for renewal of license every three years, and takes the license subject to rules that the Commission has adopted to promote the public interest.[15] In any event, what is involved is divestiture over a five year period, not forfeiture. There is the possibility of exchanges with others similarly situated or eager to trade or of waiver of the rule if the licensee can show unusual hardship. There was no record support for a finding of general hardship, and the Commission itself concluded, "Our own evaluation is that the concern

[14] *See* Memorandum Opinion and Order on reconsideration (FCC App. 151, n. 9): "[W]e again reject [the] argument that commonly owned media provide diversity. It is unrealistic to expect the same level of diversity as would be offered if the entities were under separate ownership."

[15] *See* 47 U.S.C. 301, 307(d) (1970).

[over losses] may be exaggerated." (FCC App. 87, ¶ 95.)

The Commission mistakenly ruled against divestiture in order to preserve local ownership, expressing the fear that "many sales would have to be to outside interests." (FCC App. 93.) But as the court below pointed out (FCC App. 52-53), local ownership and involvement of ownership in management are simply presumptions to aid the Commission in deciding between competing applicants for a license. Unlike diversification, they are not factors of primary importance. The Commission routinely approves voluntary sales of stations to distant, absentee buyers. Indeed, the Commission's *prospective* rule bars local newspapers from acquiring television licenses because diversity was found to outweigh local ownership.[16]

The Commission stated that divestiture might disturb "continuity of operation . . . as the new owner would lack the knowledge of the community and would have to begin raw." (FCC App. 93).[17] But as Commissioner Robinson pointed out, holdovers in high-

[16] Further, as the Court of Appeals noted (FCC App. 53) divestiture will not necessarily impair local ownership and management. About one quarter of the 79 newspaper-TV combinations are not locally owned, so divestiture could improve these situations. Indeed, "there is no reason to suppose that local entrepreneurs will not find television an attractive investment." (*Id.*)

[17] Presumably this is also the "possibility of disruption of the industry" referred to by the Commission. (FCC App. 93, ¶ 109.) Ironically, after five years of deferring to this rulemaking virtually all ad hoc challenges on concentration of control grounds—in order to consider the matter on an industry-wide scale (*see, e.g.*, Hale v. FCC, 425 F.2d 556 (D.C. Cir. 1970))—the Commission refused to require widespread divestiture partially on grounds of "disruption to the industry."

level management often smooth the transition period (FCC App. 143), even assuming some unusual disruption from divestiture. Further, 79 TV divestitures over a five year period, for example, simply do not constitute disruptions inconsistent with the public interest. If they did, the Commission's position would be at odds with its practice of routinely approving license assignments. In the five year period 1969-1973, for example, the Commission processed 165 voluntary TV transfers.[18]

Finally, the Commission expressed the fear that "[l]ocal economic dislocations are also possible as a result of the vast demand for equity capital and wide-scale divestiture could increase interest rates and affect selling price too." (FCC App. 93, ¶ 108.) There is not the slightest explanation or basis for the Commission's speculation. (See Court of Appeals Opinion, FCC App. 55.) [19]

The Court of Appeals was clearly correct in finding these reasons arbitrary and capricious. We submit that there is no need for review by this Court of the above analysis.

[18] See F.C.C. Annual Reports, 1969-1973, pp. 130, 148, 144, 167, 201, respectively. In the six years prior to the Order, the Commission approved without hearing 678 license assignments, at least 40% of which were not *pro forma* (FCC App. 54, n. 99).

[19] As the Court below correctly noted, the Commission never found a detriment to the public interest in terms of a reduction in the quality of broadcast programming because of divestiture. (*Stay Order*, FCC App. 166.) The Commission did refer in a footnote (FCC App. 93, n. 26) to a staff study, describing its methodology and conclusions; but it never indicated any reliance on that study in its decision, probably because it never placed its study on record for comments, although the "findings" were contrary to other studies which *were* in the record. *See* Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976).

3. The Validity of the Court's Final Holding

The court below therefore was correct (i) in approving the great importance assigned the diversification principle by the Commission, and (ii) in finding that the Commission erred in concluding that the other policies discussed above required it to find evidence of harm before ordering divestiture. The court's final holding thus logically followed—"that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (FCC App. 60.) For in light of the underlying Commission policy, this is a sound way to restore consistent administrative treatment and fully protect the public interest in individual instances. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

Further, the court's decision allows leeway for general action by the Commission upon remand, if based upon reasonable analysis. Thus, it stated:

> Implementation of certain divestiture rules might require individual evidentiary hearings. If, for example, the Commission were to adopt on remand a policy of requiring divestiture where combinations have over 30% of the market in the community of operation, it would presumably be necessary to determine the market shares . . . by hearing . . . .
>
> (FCC App. 36, n. 53.)

In short, there will necessarily be a "Third Report and Order." This Court need not review a clearly defective "Second Report and Order."

We believe that the inequity of the Commission's Second Report and Order is pointed up by the situation

in Washington, D.C. News, particularly of a local nature, is dominated by the two Washington daily papers, the *Star* and the *Post,* and four VHF stations, two of which (Channels 7 and 9) are licensed respectively to the *Star* and the *Post.* Because of financial difficulties, the *Star* was sold to a new owner. Under the Commission's prospective policy, the new owner was required to divest itself of the newspaper or the TV station. The Commission waived the rule for a three year period.[20] Less than two years later, the owner announced plans to exchange WMAL-TV (Channel 7, Washington) for an Oklahoma City station (KOCO-TV) and stock of the company owning the latter station.

Contrast the *Star's* situation with the *Post's* under the Commission's divestiture policy. The *Post* is the dominant newspaper in Washington. Post-Newsweek's WTOP-TV (Channel 9) is a most important source of local news. Yet unlike the *Star,* the *Post* may retain both these strong news outlets; it is most unlikely that it will ever sell WTOP-TV. Thus, the residents of Washington receive information, to a substantial extent, from the same, rather than antagonistic or diverse sources. Since the weaker competitor is more likely to need equity financing, the prospective ban against cross-ownership will require that the weaker company is split up. Meanwhile, the dominant entity, grandfathered under the Commission's new rules, will simply obtain a greater share of the market.

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[20] Washington Star Communications, 57 F.C.C.2d 475 (1975) .

CONCLUSION

The court bel w did not usurp the agency's policy making function. The Commission declared the overriding importance of diversification; the court simply affirmed. On the issue of divestiture, the court examined the Commission's reasons for not adhering to its diversification policy, and correctly found them arbitrary. In the circumstances, the court soundly concluded that to insure consistent administrative action and at the same time fully protect the public interest, divestiture is called for except where there is a clear showing that cross-ownership serves that interest. With this general guidance, the Court of Appeals simply remanded the proceeding to the Commission to devise a new, rational method for determining the divestiture question.

We submit, therefore, that further review at this time by this Court is unwarranted. If these requirements are to be changed, it should be done not by the courts but by the Congress, which has in the past interested itself in the matter of newspaper-TV cross-ownerships.[21]

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[21] *See, e.g.*, H.R. 5577, 95th Cong., Mar. 24, 1977; Broadcast License Renewal Act, 93d Cong., S. Rep. 93-1190, Sept. 27, 1974; S. 3305, 91st Cong., Jan. 19, 1970; H.R. 9583, 91st Cong., Mar. 26, 1969; H.R. 6968 and H.R. 6977, 84th Cong., June 22, 1955; S. 2321, 84th Cong., June 24, 1955; S. 3350, 83d Cong., April 26, 1954; H.R. 9865, 81st Cong., Dec. 6, 1950.

Because the decision below is correct, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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